UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Lyndsey M. Cowhig

v. Case No. 16-cv-515-PB

Megastore Auto Group, Inc., et al.

REPORT AND RECOMMENDATION[1]

Invoking this court's federal-question and supplemental jurisdiction, plaintiff Lyndsey M. Cowhig brought claims against Megastore Auto Group, Inc. for sexual harassment, retaliation, and wrongful termination and against Megastore's president, Robert M. Waters, Jr., for retaliation under an aiding and abetting theory pursuant to New Hampshire Revised Statutes Annotated § 354-A. See doc. no. 33. In May 2018, a jury found Megastore liable for sexual harassment and awarded Cowhig $110,000 in total damages. See doc. no. 115. The jury found for the defendants on Cowhig's remaining claims, including her retaliation claim against Waters. See id. The clerk of court entered judgment in accordance with the jury's verdict. Doc.

[1] A magistrate judge may typically resolve attachment motions by written order. See Fraser Eng'g Co., Inc. v. IPS-Integrated Project Servs., LLC, 2018 DNH 067, 1, 2 n.2. Given the dispositive nature of the conclusions herein, however, the court elects to issue a Report and Recommendation out of an abundance of caution. See 28 U.S.C. § 636(b)(1)(A).

no. 115. Following judgment, Judge Barbadoro awarded Cowhig $158,575.50 in attorney's fees. See June 12, 2018 Endorsed Order.

Concerned that Megastore was liquidating its assets to avoid paying the judgment and fees award, Cowhig filed a postjudgment petition to attach certain vehicles in Megastore's possession. Doc. no. 117. Judge Barbadoro referred that motion to the undersigned, and the court granted the attachment following a hearing. See June 29, 2018 Endorsed Order. At the hearing, Cowhig orally moved for postjudgment discovery under Federal Rule of Civil Procedure 69(a)(2), which the court took under advisement. Before the court had occasion to rule on that motion, however, Megastore moved for a court order requiring Cowhig to pay certain liens on the attached vehicles. See doc. no. 136. On July 31, 2018, the court granted Cowhig's oral motion for discovery and denied Megastore's motion with respect to the liens. Doc. no. 139. In that order, the court cautioned that "at some point the parties' post-judgment requests may exceed the scope of [the] court's enforcement jurisdiction." Id. at 4 (citation omitted).

Cowhig now seeks to secure her judgment through a petition to attach Waters's real estate and tangible assets. See doc. no. 143. She contends that the court has jurisdiction over this

petition as part of its ancillary jurisdiction to enforce its judgments and argues that she should be allowed to execute her judgment against Waters individually because Megastore and Waters are alter egos and Waters coordinated Megastore's attempts to liquidate its assets. See id. Waters, who represented himself at trial, secured counsel to defend against Cowhig's petition and objects to the attachment. See doc. no. 149.

The court cannot reach the merits of Cowhig's petition unless it has the jurisdiction to do so. See Gunn v. Minton, 568 U.S. 251, 256 (2013) (citation and internal quotation marks omitted) ("Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute."). Cowhig contends her petition falls within the court's ancillary enforcement jurisdiction. Such jurisdiction "is a creature of necessity, which grants a federal court the inherent power to enforce its judgments." Burgos-Yantín v. Municipality of Juana Díaz, 909 F.3d 1, 3 (1st Cir. 2018) (internal quotation marks omitted) (quoting Peacock v. Thomas, 516 U.S. 349, 356, 359 (1996)). But a court's enforcement jurisdiction is not without its limits. Ancillary jurisdiction "does not exist where the relief sought is of a different kind or on a different principle than that of the prior decree." Id.

(internal quotation marks and brackets omitted) (quoting Peacock, 516 U.S. at 358). "Likewise, ancillary enforcement jurisdiction is inapt when a party seeks to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." Id. at 4 (quoting Peacock, 516 U.S. at 357).

At first blush, Cowhig's petition might appear to fall comfortably within the court's ancillary enforcement jurisdiction. Cowhig is, after all, seeking an attachment, and the Supreme Court has approved the exercise of ancillary jurisdiction over attachment proceedings in certain contexts. See Peacock, 516 U.S. at 356-57 (collecting cases). Similarly, the First Circuit has observed "that federal enforcement jurisdiction is clear when state procedural mechanisms — such as garnishment or attachment — allow the court to reach assets of the judgment debtor in the hands of third parties in a continuation of the same action." Burgos-Yantín, 909 F.3d at 6 (citation and internal quotation marks omitted).

Unlike in a typical postjudgment attachment proceeding, however, Cowhig's current petition is not a mere continuation of the underlying action. Cowhig does not attempt to collect her judgment from Waters based solely on Megastore's liability on the sexual-harassment claim. Nor is she simply trying to attach

Megastore assets that happen to be in Waters's possession. Rather, Cowhig now argues for the first time that Waters should be personally responsible for the judgment because he and Megastore are alter egos. "[A]n alter ego claim presents a substantive theory seeking to establish liability on the part of a new party not otherwise liable." U.S.I. Properties Corp. v. M.D. Const. Co., 230 F.3d 489, 499 (1st Cir. 2000) (citation omitted). In part for this reason, the Supreme Court has held that ancillary jurisdiction does not extend to a successive action in which a federal judgment creditor attempts, under a corporate-veil theory, to enforce a judgment against an individual who was found not liable in the underlying action. See Peacock, 516 U.S. 356-60. The First Circuit reached the same conclusion when an alter-ego claim was raised by a judgment creditor for the first time in a supplemental proceeding in the original action. See U.S.I., 230 F.3d at 496-501.[2] Because Cowhig never previously raised her alter-ego theory in this case, and because the jury found in Waters's favor at trial, the

[2] In U.S.I., the court rejected an attempt to distinguish Peacock on the ground that the claim there was brought in a separate, rather than supplemental, proceeding. 230 F.3d at 500 n.10. The court noted that "[t]he simple fact that the supplemental proceeding is brought as part of the same case does not relieve the court from independent consideration of its authority to address the specific claims before it in [that] proceeding." Id. (citation omitted).

court likewise does not have ancillary jurisdiction over Cowhig's petition.

Cowhig seeks refuge in the fact that Waters, as a defendant in the underlying action, is not a new party. This argument is undermined by the Supreme Court's decision in Peacock. As noted, the judgment creditor in that case sought to extend liability under a corporate-veil theory to an individual who, like Waters, was named as a defendant but found not liable in the underlying action. Peacock, 516 U.S. at 351-52. The Court concluded that the fact that individual was not otherwise liable and that the attempt to execute the judgment was based on "entirely new theories of liability" meant that ancillary jurisdiction did not extend to the enforcement action. Id. at 358-60. The same as true in this case. Waters's status as a defendant is therefore immaterial.

The court is likewise unpersuaded by Cowhig's argument that ancillary jurisdiction extends to her petition because her alter-ego claim and her underlying claims are factually interdependent. While the First Circuit has "not rule[d] out the possibility that some alter ego claims will present sufficiently intertwined factual issues to warrant [ancillary jurisdiction]," U.S.I., 230 F.3d at 499 n.9, Cowhig makes no attempt to explain why that is so here. Nor has she cited any

case in which a federal court concluded that it possessed ancillary jurisdiction over an alter-ego claim raised for the first time after judgment was entered. The court therefore declines to find jurisdiction on this basis.

Cowhig also suggests that this court has ancillary jurisdiction over her petition because state-court attachment procedures are available in federal court under Federal Rule of Civil Procedure 64. The First Circuit rejected an analogous argument in U.S.I., noting that the availability of state-law enforcement procedures in federal proceedings under Rule 69(a) did not establish federal enforcement jurisdiction over those procedures. See 230 F.3d at 498 n.8. In so concluding, the court emphasized that "as courts of general jurisdiction, [state courts] are free to employ any enforcement mechanisms warranted by state law," whereas "the limited nature of federal jurisdiction in general confines the scope of enforcement jurisdiction as well." Id. The court further noted that the Federal Rules of Civil Procedure, by their express terms, "can neither expand nor limit the jurisdiction of the federal courts." Id. (citing Fed. R. Civ. P. 82). Because this reasoning has equal force in the context of Rule 64, Cowhig's reliance on that rule is unavailing.

Finally, Cowhig argues that a state court considering her

petition to attach would "not have the benefit of understanding the unique context of this case . . . ." Doc. no. 143-1 at 3-4. The Supreme Court made clear in Peacock that convenience and judicial economy alone cannot justify extending ancillary jurisdiction to claims over which such jurisdiction would not otherwise lie. See 516 U.S. at 355 (citation and internal quotation marks omitted) ("[N]either the convenience of litigants nor considerations of judicial economy can justify the extension of ancillary jurisdiction over Thomas' claims in a subsequent proceeding."). Because there is no other basis for ancillary jurisdiction over her petition, Cowhig's convenience and judicial economy arguments similarly fail.

For all of these reasons, the court concludes that it does not have ancillary enforcement jurisdiction over Cowhig's petition to attach (doc. no. 143). Because Cowhig does not assert, and the court cannot discern, any independent basis for federal jurisdiction over that petition, see U.S.I., 230 F.3d at 500, the district judge should dismiss the petition without prejudice to Cowhig refiling it as a separate action in state court. Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). The fourteen-day period may be extended upon motion. Failure to file specific written objections to the

Report and Recommendation within the specified time waives the right to appeal the district court's order. See Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016); Fed. R. Civ. P. 72(b)(2).

Andrea K. Johnstone
United States Magistrate Judge

January 11, 2019

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